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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)	3:98-cr-00108-HDM
)	3:17-cv-00200-HDM
Respondent/Plaintiff,)	
)	
vs.)	ORDER
)	
MATEO HERNANDEZ-De LUNA,)	
)	
Petitioner/Defendant.)	
_____)	

Before the court is defendant Mateo Hernandez-De Luna's petition for relief under 28 U.S.C. § 2255 filed on March 31, 2017. (ECF No. 26).

On September 29, 1999, Hernandez-De Luna pled guilty to a one-count violation of 8 U.S.C. § 1326, unlawful reentry of a deported alien. On January 24, 2000, Hernandez-De Luna was sentenced to be imprisoned for a total term of seventy months and two years of supervised release. (ECF No. 21). On February 3, 2000, the judgment was amended to have the sentence run consecutively to the undischarged term of imprisonment for case CR96-1527 (a state court case). (ECF No. 22). Hernandez-De Luna did not appeal his conviction.

Pursuant to 28 U.S.C. § 2255, a federal inmate may move to vacate,

1 set aside, or correct his sentence if: (1) the sentence was imposed
2 in violation of the Constitution or laws of the United States; (2) the
3 court was without jurisdiction to impose the sentence; (3) the
4 sentence was in excess of the maximum authorized by law; or (4) the
5 sentence is otherwise subject to collateral attack. 28 U.S.C.
6 § 2255(a). The statute imposes a strict one-year statute of
7 limitation for the filing of such motions. *Id.* at § 2255(f). The
8 one-year period runs from the latest of four specified events:

9 (1) the date on which the judgment of conviction becomes
10 final;

11 (2) the date on which the impediment to making a motion
12 created by governmental action in violation of the
13 Constitution or laws of the United States is removed, if
14 the movant was prevented from making a motion by such
15 governmental action;

16 (3) the date on which the right asserted was initially
17 recognized by the Supreme Court, if that right has been
18 newly recognized by the Supreme Court and made
19 retroactively applicable to cases on collateral review;
20 or

21 (4) the date on which the facts supporting the claim or
22 claims presented could have been discovered through the
23 exercise of due diligence.

24 *Id.* at § 2255(f). The defendant does not argue that his motion is
25 timely based on any of the four events specified in § 2255(f).
26 Rather, the defendant asserts that he "wasn't aware of any Appeal
27 Rights." (ECF No. 26 at 11).

28 Even if the motion is untimely, the one-year statute of
limitations on § 2255 is subject to equitable tolling, which applies
when "extraordinary circumstances beyond [the movant's] control made
it impossible to file a petition on time and the extraordinary
circumstances were the cause of his untimeliness." *United States v.*
Battles, 362 F.3d 1195, 1197 (9th Cir. 2004) (quoting *Laws v.*
Lamarque, 351 F.3d 919, 922 (9th Cir. 2003)). If the defendant can
prove that he has diligently pursued his rights and extraordinary

1 circumstances exist, the court may toll the one-year statute of
2 limitations. *United States v. Aguirre-Ganceda*, 592 F.3d 1043, 1045
3 (9th Cir. 2010).

4 Here, the amended judgment was entered on February 3, 2000.
5 Defendant did not appeal his conviction. Defendant filed his motion
6 for relief under 28 U.S.C. § 2255 on March 31, 2017, which is more
7 than 17 years after entry of judgment. Therefore, under § 2255's
8 one-year statute of limitations, the defendant's motion is untimely.

9 The defendant has failed to make a showing that he diligently
10 pursued his rights or that extraordinary circumstances exist that
11 would justify the tolling of the one year limitation period. The only
12 reason he expresses for the 17 year delay in filing his motion is that
13 he "wasn't aware of any Appeal Rights. . ." This reason is
14 insufficient to establish any basis for the court to conclude that the
15 defendant may have a colorable claim for equitable tolling. As such,
16 the defendant is not entitled to equitable tolling and this court
17 finds that his petition is untimely.

18 IT IS THEREFORE ORDERED that defendant Mateo Hernandez-DeLuna's
19 petition for relief under 28 U.S.C. § 2255 (ECF No. 26) is **DENIED**.

20 IT IS FURTHER ORDERED that petitioner is **DENIED** a certificate of
21 appealability.

22 DATED: This 9th day of May, 2017.

23
24 
25 UNITED STATES DISTRICT JUDGE
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